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OF THE

United States

OCTOBER TERM, 1979

NO. 79-97

CALIFORNIA RETAIL LIQUOR DEALERS ASSOCIATION,
a California corporation,
Petitioner

vs.

MIDCAL ALUMINUM, INC., a California corporation,
Respondent

BAXTER RICE as Director of the Department of
Alcoholic Beverage Control of the State of California
Respondent

BRIEF OF VIRGINIA BEER WHOLESALERS ASSOCIATION, AMICUS CURIAE, IN SUPPORT OF PETITIONER

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INTERESTS OF AMICUS CURIAE*

The Virginia Beer Wholesalers Association is an independent voluntary association consisting of ninety-four (94) businesses licensed in Virginia to engage in the wholesale beer business. The Virginia Beer Wholesalers Association represents nearly all of the businesses so licensed. The operations of beer wholesalers in Virginia are governed by a comprehensive scheme of legislation adopted by the General Assembly of Virginia which is set forth in Title 4, Chapters 1, 2 and 2.1 of the Code of Virginia (1950), as amended,

* Counsel for the parties have consented to the filing of this brief in written communications which have been filed with the Clerk of the Court pursuant to Rule 42(2) of the Rules of this Court.

relating to alcoholic beverage control generally, beverages of not more than three and two-tenths percent (3 2/10%) alcohol and beer franchises, respectively. In addition, the Virginia Alcoholic Beverage Control Commission, pursuant to authority delegated by the legislature in the aforementioned statutes, has enacted a comprehensive set of regulations governing operation of, *inter alia,* licensed Virginia beer wholesalers. See, *Regulations of the Virginia Alcoholic Beverage Control Commission,* July 1, 1979. This comprehensive scheme of state regulation of the malt beverage business in Virginia requires, *inter alia,* that a three-tier system of distribution be maintained involving the strict separation of brewers, wholesalers and retailers; that each tier of the distribution system refrain from acquiring a financial interest in the succeeding tier; that all beer and malt beverages imported into the State from other States for delivery and use therein be channeled through wholesale distributors; that such wholesale distributors be licensed pursuant to the statutes and regulations previously mentioned, that prices at which each brewer and each wholesaler shall sell be posted pursuant to Regulations adopted by the Commission; that certain activities and agreements, express or implied, have the effect of creating beer franchises, and that certain rights and obligations inure to the parties to such franchises, pursuant to relevant statutes.

The entire framework for controlling the manufacture, distribution, sale and possession of alcoholic beverages in the Commonwealth of Virginia was enacted pursuant to the police power of the Commonwealth and its grant of authority under the Twenty-first Amendment. The decision of the California Supreme Court in *Rice* v. *Alcoholic Bev. etc.*

Appeals Board, 21 Cal.3d 431 (1978), relied upon by the court below, raises issues of fundamental importance in determining the scope of the Twenty-first Amendment and its relationship to the commerce clause. The rationale of the *Rice* decision, insofar as the Twenty-first Amendment is concerned, if allowed to stand by this Court, threatens to undermine the legislative and regulatory framework adopted by the Commonwealth of Virginia in the belief that the Twenty-first Amendment has authorized it to take such measures as it sees fit to control alcoholic beverages destined for delivery or use within its borders, free of traditional commerce clause restraints. As a consequence, the interests of the members of the Virginia Beer Wholesalers Association are directly and vitally affected by this case.

While *amicus* has no doubt that the petitioner is capable of seriously and skillfully defending its interests, it is concerned that the petitioner's natural emphasis upon the issues that affect it most immediately may cause it to fail to fully explore the ramifications of the Twenty-first Amendment issue for other concerned parties, such as *amicus.* The *Rice* rationale, if sustained, could readily be applied by other courts in a wide range of contexts and do serious injury to the stability of the statutory framework for the control of alcoholic beverages not only in the Commonwealth of Virginia, but, indeed, throughout the country. The interest of *amicus* is limited, however, to the Twenty-first Amendment issue certified by this Court in its order granting the petition for writ of certiorari.

SUMMARY OF ARGUMENT

The legislative history of the Twenty-first Amendment, its express language and the Supreme Court decisions construing the Amendment make it clear that this provision of the Constitution was intended to grant to the states authority to control the distribution and use of alcoholic beverages within state borders unfettered by the traditional constraints of the commerce clause. The intent of the framers of the Twenty-first Amendment was to remove the commerce clause as a barrier to the enforcement of state laws designed to prohibit, regulate or control the delivery or use of alcoholic beverages within state borders. No decision of this Court has held to the contrary. In every case in which this Court has been confronted with a commerce clause-based challenge to a state law aimed at the control of alcoholic beverages delivered or used within a state, the challenge has been rejected. In no case was the result a product of a Twenty-first Amendment versus commerce clause "balancing test;" rather, in each case, the results flowed from a determination that the commerce clause was simply inapplicable.

The California Supreme Court's decision in *Rice* now threatens to rewrite this well established line of judicial construction of the scope of the Twenty-first Amendment. Indeed, the *Rice* rationale threatens to demote the Twenty-first Amendment to the level of a mere factor, to be considered together with commerce clause-derived factors, even in cases which fall within the express terms of the Amendment. The result in *Rice* stems from a misreading of several lines of decisions of this Court determining that the state law in question (a) operated to prohibit or unduly

burden the flow of alcoholic beverages *through* the state and thus was not intended to be shielded from the operation and effect of the commerce clause or (b) impinged upon some provision of the Constitution other than the commerce clause, as to which the Twenty-first Amendment was never intended to have a limiting effect.

The cause of the erroneous Twenty-first Amendment result in the *Rice* decision is the California Supreme Court's misreading of *Hostetter* v. *Idlewild Bon Voyage Liquor Corporation,* 377 U.S. 324 (1964). A correct reading of *Hostetter* establishes it as a so-called "through" case in which this Court held, after weighing an unusual factual situation, that the case did not fall within the scope of the Twenty-first Amendment because the liquor in question was not destined for delivery and use within the State of New York. *Rice* mistakenly construes *Hostetter* as a case in which this Court found both the Twenty-first Amendment and the commerce clause to be applicable and, as a matter of law, that the commerce clause outweighed the Twenty-first Amendment. A careful reading of *Hostetter,* however, demonstrates that this Court determined, upon the exceptional facts presented, that the authority sought to be exercised was not granted to the states by the Twenty-first Amendment. Having found on the facts that the case fell outside the scope of the Amendment, this Court then applied traditional commerce clause restraints.

Finally, the significance attached by the *Rice* Court and respondents herein to the line of decisions involving federal Constitutional challenges to state alcoholic beverage statutes on non-commerce clause grounds is misplaced. It is clear that the framers of the Amendment intended only to

deflect the normal operation of the commerce clause. There is no evidence that the framers of the Amendment intended it to limit the operation of any provision of the Constitution other than the commerce clause. It is difficult to understand why the decisions of this Court involving Fifth Amendment, Fourteenth Amendment and Export-Import Clause challenges to state liquor statutes should be thought to have significance for commerce clause-based attacks on such laws.

It is well settled that the Twenty-first Amendment operates in conjunction with all other provisions of the United States Constitution, excluding the commerce clause. Accordingly, this Court has found that the Amendment does not save even a state law within its scope from the reach of these other provisions of the Constitution.

I
ARGUMENT

THE LEGISLATIVE HISTORY OF THE TWENTY-FIRST AMENDMENT DEMONSTRATES THE FRAMERS' INTENT TO GRANT THE STATES AUTHORITY TO REGULATE THE DELIVERY AND USE OF ALCOHOLIC BEVERAGES WITHIN THEIR BORDERS, UNFETTERED BY TRADITIONAL COMMERCE CLAUSE RESTRICTIONS

Prior to the enactment of the Twenty-first Amendment, the federal government had plenary power under the commerce clause of the United States Constitution,[1] with respect to foreign and interstate traffic in alcoholic beverages. *Adams Exp. Co.* v. *Kentucky,* 238 U.S. 190 (1915); *License Cases* (*US*) 5 How. 504, 585, 607 (1847).

[1] U.S. Constitution, Article 1, Section 8: "The Congress shall have power to regulate commerce with foreign nations, and among the several states, and with the Indian Tribes."

The history of state regulation of alcoholic beverages dates long before adoption of the Eighteenth Amendment. In the *License Cases, supra,* 504, the Court recognized a broad authority in the states to regulate the alcoholic beverage trade within their borders free from implied restrictions under the commerce clause. Later in the century, however, *Leisy v. Hardin,* 135 U.S. 100 (1890), undercut the *License Cases.* This lead Congress, acting pursuant to its powers under the commerce clause, to reactivate the state's regulatory rule through the passage of the Wilson[2] and Webb-Kenyon[3] Acts. *See, e.g., Clark Distilling Co.* v. *Western Maryland R. Co.,* 242 U.S. 311 (1917) (upholding Webb-Kenyon Act); *In re: Rahrer,* 140 U.S. 545 (1891) (upholding Wilson Act).

The Webb-Kenyon Act, enacted in 1913 and reenacted in 1935, took away the protection of interstate commerce from all receipt and possession of liquor prohibited by state law. That the commerce clause of the Constitution prevents the enforcement of prohibitions prescribed by state laws was denied in the case of *Clark Distilling Co., supra,* wherein the Court upheld the constitutionality of the Webb-Kenyon Act after observing:

[2] The Wilson Act, enacted in 1890, reads in pertinent part: ". . . intoxicating liquors or liquids transported into any State or Territory . . . shall upon arrival in such State or Territory be subject to the operation and effect of the law in such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as those such liquids or liquors had been produced in such State or Territory. . . ." 27 U.S.C.A. § 121.

[3] The Webb-Kenyon Act of 1913 prohibits "[t]he shipment or transportation . . . of any . . . intoxicating liquor of any kind, from one State, Territory or District . . . into any other State, Territory, or District . . . [for the purpose of being] received, possessed, sold, or in any manner used . . . in violation of any law of such State, Territory, or District. . . ." 27 U.S.C.A. § 122.

> The movement of liquor in interstate commerce and the receipt and possession and right to sell prohibited by the state law having been in express terms divested by the Webb-Kenyon Act of their interstate commerce character, it follows that if that act was within the power of Congress to adopt, there is no possible reason for holding that to enforce the prohibitions of the state law would conflict with the commerce clause of the Constitution . . . 242 U.S. at 325.

The Twenty-first Amendment repealed the Eighteenth Amendment in 1933. The wording of Section 2 of the Amendment closely follows the Webb-Kenyon Act and the Wilson Act, thereby "expressing the framers' clear intention of constitutionalizing the Commerce Clause framework established under those statutes." *Craig* v. *Boren,* 429 U.S. 190, 206 (1976). This Court's decisions since have confirmed that the Amendment primarily created an exception to the normal operation of the commerce clause. *See, e.g., Hostetter* v. *Idlewild Bon Voyage Liquor Corp.,* 377 U.S. 324, 330 (1964); *Carter* v. *Virginia,* 321 U.S. 131, 139-140 (1944) (Frankfurter, J., concurring); *Finch & Co.* v. *McKittrick,* 305 U.S. 395, 398 (1939).

In addition to the Amendment's embrace of the policy of Webb-Kenyon, the Senate debates illustrate that state law supremacy in dealing with internal alcoholic beverage trade was the objective of the framers. As reported by the Senate Committee on the Judiciary in S. J. Res. 211, 72d Cong., 2d Sess. (1933), the proposed Amendment provided in section 2, "the transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors in violation

of the laws thereof is hereby prohibited." 76 Cong. Rec. 4138 (1933). That language is in the Amendment as adopted.

But the proposal also contained a section 3, not found in the present Amendment. That section provided, "Congress shall have *concurrent* power to regulate or prohibit the sale of intoxicating liquors to be drunk on the premises where sold." *Ibid.* (Emphasis added). Proposing to leave even this remnant of federal control over liquor traffic gave rise to the only real controversy over the language of the proposed Amendment. *See, Hostetter* v. *Idlewild Liquor Corp., supra,* at 337.

Senator Blaine, referring to the Republican[4] and Democratic Party[5] platform provisions dealing with proposed section three of the Amendment, said "They both proposed to prevent the return of the saloon . . . the Republican platform proposes to do it by leaving in Congress some power . . . because after the eighteenth amendment is repealed the Congress will have no police powers . . . the Republican platform proposes to repose the power not only in the states but also in the Congress. . . ." *supra* at 4141.

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[4] "We, therefore, believe that the people should have an opportunity to pass upon a proposed Amendment the provision of which, while retaining in the Federal Government power to preserve the gains already made in dealing with the evils inherent in the liquor traffic, shall allow States to deal with the problem as their citizens may determine, but subject always to the power of the Federal Government to protect those States where prohibition may exist and safeguard our citizens everywhere from the return of the saloon and attendant abuses." 76 Cong. Rec. 4141 (1933).

[5] "We urge the enactment of such measures by the several States as will actually promote temperance, effectively prevent the return of the saloon, and bring the liquor traffic into the open under complete supervision and control by the States." 76 Cong. Rec. 4141 (1933).

Senator Walsh of Massachusetts, in commenting upon the difference between the two party platforms, stated: "Is not the difference in the two party platforms in substance this, That the Democratic Party platform declares for the States and the States alone determining the manner in which intoxicating liquors shall be manufactured, sold, and distributed, while the Republican Party platform holds to control over the method of sale in part by the Federal Government and in part by the State governments?" *Id.* at 4142.

In commenting upon his views regarding the need to delete section 3 from the proposed Twenty-first Amendment, Senator Blaine stated: "Mr. President, my own personal viewpoint upon section 3 is that it is contrary to section 2 of the Resolution. . . . The purpose of section 2 is to restore to the States by constitutional amendment absolute control in effect over interstate commerce affecting intoxicating liquors which enter the confines of the state. The state under section 2 may enact certain laws on intoxicating liquors, and section 2 at once gives such laws effect. . . . [U]nder section 3, the proposal is to take away from the states the powers that the states would have in the absence of the eighteenth amendment. . . . [S]ection 3 is inconsistent with section 2 and the two sections are incompatible and that section 3 ought to be taken out of the Resolution. . ." *Id.* at 4143.

Senaor Wagner of New York opposes section 3 because it would defeat the proposed Amendment's purpose "to restore to the States control of their liquor problem." *Id.* at 4145.

Senator Wagner made these comments in opposition to section 3: "The real cause of the failure of the eighteenth

amendment was that it attempted to impose a single standard of conduct upon all the people of the United States without regard to local sentiment . . . Section 3 of the pending joint resolution proposes to condemn the new amendment to a similar fate of failure. . . [N]o law can live unless it finds it lodgment in the public conscience. . . [S]ection 3 does not in itself impose a national standard but it invites Congress to impose it. . . ." *Id.* at 4146.

Senator Wagner then continued to discuss the legal effects of section 3: "As for the saloon—let us face the fact that it is beyond the realm of proper Federal action. The duty of preventing its restoration rests upon the State. . . consequently, I am fully satisfied that if we permit our Government to function as it was intended to function, through the States, we shall find that the people of each of the 48 States will adopt those methods which will. . . bring the liquor traffic under control and actually promote temperance. . . . Federal guarantees are futile. At the bedrock of this entire question lies this immovable truth: That there is nothing the Constitution can say, nothing the Federal Government can do, which will successfully impose a rule of conduct upon a community except by the will of the people of that community." The Senator then succinctly states the issue: "The problem confronting us, Mr. President, is to choose between two alternative courses. Either the control of the local liquor traffic is to remain in the Federal Government or is it to be restored to the States." *Id.* at 4147-4148.

Amicus submits that it is clear that this opposition to section 3 resulted from the fear voiced during the Senate debate that any grant of power to the Federal Government

could be used to whittle away the exclusive control over liquor traffic given the states by section 2.

Senator Robinson of Arkansas, the Senate Majority Leader, in response to the Senators' fear regarding the grant of power to the Federal Government, asked for a vote "to strike out section 3." *Id.* at 4171. The Senate then voted to delete section 3 from the proposed Amendment while retaining section 2 with its broad grant of power to the states. *Id.* at 4179.

During the debate on the motion to strike section 3, the Senators brought out clearly that section 2, as it now appears in the Twenty-first Amendment, was intended to give the states the broadest possible power in dealing with internal alcoholic affairs. Senator Blaine of Wisconsin, Chairman of the Subcommittee which had held hearings on the Resolution and Floor Manager of the Resolution in the Senate, agreed that section 3 "ought to be taken out of the Resolution" and section 2 left in, because the "purpose of section 2 is to restore to the States by constitutional amendment absolute control in effect over interstate commerce affecting intoxicating liquors which enter the confines of the State." *Id.* at 4143.

This legislative history, *amicus* submits, indicates that when the Senators agreed to section 2 [thereby deleting section 3] they thought they were returning "absolute control" of liquor traffic to the states, free of all restrictions which the commerce clause might before that time have imposed. Moreover, by rejecting section 3, *amicus* suggests the Senators thought that the federal government would be prevented from interfering with the state's exercise of the power conferred by the Amendment.

Senator Borah of Idaho perhaps expressed the concerns of the Senators most completely when he traced the history of state regulation of liquor traffic from Justice Taney's decision in the *License Cases,* 5 How. 504 (1847), which upheld state power over liquor, through *Bowman* v. *Chicago and N. R. Co.,* 125 U.S. 465 (1888), which Senator Borah said "wiped out the Taney decision," to *Leisy v. Hardin,* 135 U.S. 100 (1890) which made the states "powerless to protect themselves against the importation of liquor into the States." 76 Cong. Rec. 4170-4171 (1933). It was because of this judicial history that Senator Borah intended, by expressing his uneasiness at leaving anything less than a Constitutional Amendment "to the protection of the Supreme Court of the United States," to guarantee that the states would not be rendered powerless over liquor traffic. *Ibid.; Hostetter, supra,* at 340. Despite the framers' clear intent to the contrary, the balancing test employed by the *Rice* decision interprets the Twenty-first Amendment to have reserved in the federal government basic commerce clause authority over alcoholic beverages delivered or used within state borders. *Amicus* submits that the legislative history of the Twenty-first Amendment mandates a contrary result.

II

THE "THROUGH-INTO" METHOD OF TWENTY-FIRST AMENDMENT ANALYSIS EMPLOYED IN THE DECISIONS OF THIS COURT ESTABLISHES THE SUPREMACY OF STATE LAWS, CONTROLLING ALCOHOLIC BEVERAGE TRADE WITHIN STATE BORDERS, OVER THE COMMERCE CLAUSE

In *State Board* v. *Young's Market Co.,* 299 U.S. 59 (1936), this Court rejected a commerce clause and equal

protection challenge to a California statute imposing a five hundred dollar license fee for the privilege of importing beer from another state for delivery or use therein. The Court determined that the Twenty-first Amendment had authorized California to impose a restriction which, prior to the adoption of the amendment, would unquestionably have constituted an unlawful burden upon interstate commerce. *Young* began a consistent line of so-called "into" cases in which the Court has invariably sustained state laws regulating the transportation of alcoholic beverages into states for delivery or use therein against commerce clause-based challenges. The *Young* decision also established that the Amendment was intended to confer upon the States not merely the power to prohibit the importation of alcoholic beverages but to adopt lesser degrees of control and regulation as they see fit. The Court observed that the words of the Amendment are so clear as to "confer upon the State the power to forbid all importations which do not comply with the conditions which it prescribes." 299 U.S. at 62.

The decision in *Collins* v. *Yosemite Park Company*, 304 U.S. 518 (1938), clearly develops the distinction between the "into" cases and the "through" cases. In *Collins*, the Court determined that shipments of liquor through the State of California destined for delivery and use in a national park did not constitute transportation or importation into California "for delivery or use therein" within the meaning of the Twenty-first Amendment since the national park was under a distinct sovereignty apart from the State of California. 304 U.S. at 538. The "through-into" dichotomy was also adopted in *Carter* v. *Virginia*, 321 U.S. 131

(1944), although in that case the mode of regulation chosen by Virginia as a means of preventing the unlawful diversion into intrastate commerce of a "through" shipment was upheld as reasonable.

The Supreme Court further developed the rationale of the "into" cases in *U.S.* v. *Frankfort Distilleries*, 324 U.S. 293 (1944), wherein it determined that the Twenty-first Amendment did not operate to shield purely private conduct from the applicability of the commerce clause in cases where the state has failed to exercise the authority conferred upon it by the Amendment. The *Frankfort Distilleries* case involved a Sherman Act prosecution of a private combination among liquor producers, wholesalers and retailers to coerce competitors into signing "Fair Trade" contracts for liquor commodities. The *Frankfort Distilleries* Court considered the argument that the Twenty-first Amendment shielded the defendants from prosecution under the Sherman Act, but observed that the Sherman Act was not being enforced in a manner that conflicted with the law of the state. The decision thus demonstrates that State supremacy over the commerce clause exists only when the State has undertaken to regulate in an area to which the commerce clause would otherwise apply. Justice Frankfurter, in a concurring opinion frequently cited in subsequent cases, observed:

> As a matter of constitutional law, the result of the Twenty-first Amendment is that a State may erect any barrier it pleases to the entry of intoxicating liquors. Its barrier may be low, high or insurmountable. Of course, if a State chooses not to exercise the power given it by the Twenty-first Amendment and to con-

> tinue to treat intoxicating liquors like other articles, the operation of the Commerce Clause continues. Since the Commerce Clause is subordinate to the exercise of state power under the Twenty-first Amendment, the Sherman Law, deriving its authority from the Commerce Clause, can have no greater potency than the Commerce Clause itself. It must equally yield to state power drawn from the Twenty-first Amendment. 324 U.S. at 300-301.

The decision in *Department of Revenue* v. *James B. Beam Distilling Company,* 377 U.S. 341 (1964), further illusrates the Court's adherence to the "through-into" dichotomy. In *Beam,* the Court determined that a Kentucky tax on foreign imports which, when delivered to a bonded warehouse in Kentucky retained their character as imports, was unconstitutional under the Export-Import Clause.[6] The Court appeared to presume that the liquor was destined to be sent through the state for ultimate delivery in other states. It pointed out that, were the liquor destined for distribution, use or consumption within the state, then

> . . . under the Twenty-first Amendment Kentucky could not only regulate, but could completely prohibit the importation of some, or of all [such] intoxicants. 377 U.S. at 346.

[6] U.S. Const., Art. I, § 10, cl. 2. "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress."

See, Heublein, Inc. v. *South Carolina Tax Commission,* 409 U.S. 275, 283 (1972) and *United States* v. *State Tax Commission of Mississippi,* 412 U.S. 363, 375 (1973).

Against this background of the line of Supreme Court decisions adhering to the "through-into" dichotomy for determining whether to apply the Twenty-first Amendment or the commerce clause, the *Rice* decision seizes upon *Hostetter* as signifying an embrace of "constitutional balancing" as a new tool for Twenty-first Amendment analysis.

In light of the significance attached to *Hostetter* by the *Rice* decision, *Hostetter* bears extended analysis. In *Hostetter* an unlicensed New York liquor retailer was engaged in the sale of liquor to passengers at Kennedy Airport departing for foreign destinations. The liquor was not delivered to the customers in New York, but rather was transported to the awaiting planes and delivered to the consumers upon their arrival at their foreign destinations. The liquor was at all times during its movement into New York and to the awaiting aircraft subject to the control of the U.S. Bureau of Customs. In deciding the case, the Court attached major significance to *Collins, supra,* a "through" case. Writing for the majority, Justice Stewart observed:

> Both the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case.
>
> This principle is reflected in the Court's decision in *Collins* v. *Yosemite Park Company,* 304 U.S. 518. There it was held that the Twenty-first Amendment did not give California power to prevent the shipment into

and through her territory of liquor destined for distribution and consumption in a national park. The Court said that this traffic did not involve "transportation into California 'for delivery or use therein' " within the meaning of the Amendment. "The delivery and use is in the Park, and under a distinct sovereignty."

A *like* accommodation of the Twenty-first Amendment with the Commerce Clause leads to a *like* conclusion in the present case. Here, ultimate delivery and use is not in New York but in a foreign country. The State has not sought to regulate or control the passage of intoxicants through her territory in the interest of preventing unlawful diversion into the internal commerce of the State. [Emphasis added]. 377 U.S. at 332-333.

The "accommodation" made by the *Hostetter* decision rested upon the Court's determination that the unusual facts with which it was presented more closely touched interests intended to be furthered by the commerce clause than those addressed by the Twenty-first Amendment. *Hostetter* therefore must be viewed as a "through" case.

The rationale implicit in *Rice* that a *Hostetter* "accommodation test" supports a conclusion that the Twenty-first Amendment may be outweighed by the commerce clause "even in those situations covered by the express language of the Amendment," 21 Cal.3d at 449, is demonstrably incorrect. This Court's reference to "a like accommodation" to describe the basis for the *Hostetter* result was a clear reference to the rationale employed in *Collins, supra. Collins* analyzed the facts in order to determine whether the case presented issues arising within the scope of the Twenty-first Amendment or within the scope of the commerce clause. Nowhere in *Hostetter* or *Collins,* or any other "through" case which this Court has decided, is there any suggestion that the commerce clause might outweigh the Twenty-first Amendment in cases to which they both apply.

The *Rice* court begins its discussion of the Twenty-first Amendment issue with the accurate observation that "it is settled that States do not have plenary powers over all matters relating to alcoholic beverages," 21 Cal. 3d at 448. The Court then proceeds to the conclusion that *Hostetter* supports the proposition that "when a statute enacted pursuant to the Twenty-first Amendment conflicts with an enactment based on the commerce clause, we must *balance the policies* furthered by each in order to determine which should prevail." *Id.* (Emphasis added). The *Hostetter* decision does not support *Rice's* use of a policy balancing test. Rather, in *Hostetter* the Court considered the juxtaposition of policies furthered by the Twenty-first Amendment and the commerce clause in order to determine, upon the facts of the case at bar, whether the interests sought to be protected were those within the purview of the Amendment or whether they more properly came within the realm of the commerce clause.[7]

The California Supreme Court's policy balancing view of *Hostetter* stems from its decision in *Sail'er Inn., Inc.* v. *Kirby,* 5 Cal. 3d 1 (1971). In *Sail'er Inn,* the California Court adopted a novel balancing approach to reach the conclusion that the Twenty-first Amendment can be subordinated to the commerce clause "even in those situations

[7] *See,* Note, *The Evolving Scope of State Power Under The Twenty-first Amendment, 19 Rutgers L. Rev. 759, 772-73* (1965).

covered by the express language of the Amendment," *Id.*, at 12, a conclusion of Orwellian proportions in light of the clear intent of the framers of the Twenty-first Amendment to constitutionalize its supremacy over the commerce clause in cases involving the validity of state laws aimed at controlling alcoholic beverages delivered or used within their borders.

Having thus misread *Hostetter,* and relying upon its evisceration of the very purpose of the Twenty-first Amendment in *Sail'er Inn, Rice* proceeded to the employment of the "balancing test," an "explicit adoption" of which it divined in *Hostetter.* 21 Cal.3d at 449. *Rice* sidestepped this Court's clear pronouncements in decisions subsequent to *Hostetter* demonstrating that this Court had merely weighed diverse constitutional interests as an aid to the "through-into" method of analysis upon the facts of each case.

Rice then compounded its misreading of *Hostetter* by failing even to balance competing constitutional considerations. Rather, it applied an ordinary "commerce clause versus legitimate local interest" balancing approach. *Rice* considered the effectiveness of the California resale price maintenance statutes in accomplishing their intended purpose; the impact of those statutes upon competition; the impact of "public policy;" and whether California might have selected a less restrictive alternative to the resale price maintenance statute in question. *Id.* at 454-458. Nowhere in this "balancing test" is there a reference to the Twenty-first Amendment; to the "wide latitude" commanded by the Twenty-first Amendment in reviewing state alcoholic beverage statutes; or to the "added weight" in favor of the

validity of state alcoholic beverage statutes conferred by the Twenty-first Amendment. Having paid lip service to the decisions of this Court confirming that traditional commerce clause restraints are not applicable to state alcoholic beverage statutes falling within the scope of the Twenty-first Amendment, the Court nevertheless proceeded to apply traditional commerce clause restraints in the *Rice* case. In fact, it is implicit in the *Rice* decision that the Sherman Act enjoys supremacy over the Twenty-first Amendment, a proposition which, it hardly need be said, is preposterous.

The decisions of this court subsequent to *Hostetter* demonstrate beyond all reasonable doubt that *Hostetter* did not inaugurate a new approach to resolving Twenty-first Amendment conflicts with the commerce clause. Of particular significance is *Seagram & Sons* v. *Hostetter,* 384 U.S. 45 (1966). In *Seagram,* a New York statute requiring nationwide price affirmation by liquor wholesalers was attacked for, among other reasons, its alleged burden upon interstate commerce. The Court described the case as involving an attempt to control the flow of liquor destined for use within a state and observed that, *because of that fact,* "the Twenty-first Amendment demands wide latitude for regulation by the state." The Court did not engage in a "balancing" of the competing policies underlying the Twenty-first Amendment and the commerce clause in its evaluation of the validity of the statute in question. Indeed, it expressly declined *Seagram's* invitation to do so. The Court observed:

> We need not now decide whether the mode of liquor regulation chosen by a State in such circumstances could ever constitute so grave an interference with a

company's operation *elsewhere* as to make the regulation invalid under the Commerce Clause [Citations]. No such situation is presented in this case. [Emphasis added]. 384 U.S. at 42-43.

Having thus asserted its view that the case presented no confrontation between the Twenty-first Amendment and the commerce clause, the court proceeded to consider the effect of the statute in terms of the alleged burden upon the operations of the company in other states. Assuming, *arguendo,* that the *Seagram* Court considered a Twenty-first Amendment versus commerce clause issue, it is clear that it did so only because of the "reach" of the statute beyond the borders of the state and not because of any aspect of its operation within New York State.

The significant message in *Seagram* lies in its citation of *Hostetter* as support for the traditional view that "a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders." *supra,* at 42. Further, the *Seagram* opinion explained the result in *Hostetter,* not in terms of a constitutional balancing test as the *Rice* decision contends, but rather because of the simple fact that, in *Hostetter:*

> "the ultimate delivery and use of the liquor was in a foreign country, and the Court held that under those circumstances New York could not forbid sales made under the explicit supervision of the United States Customs Bureau, pursuant to laws enacted by Congress under the Commerce Clause for the regulations of commerce with foreign nations. [Citations] Unlike [Hostetter], the present case concerns liquor destined

> for use, distribution or consumption in the State of New York. In that situation, the Twenty-first Amendment demands wide latitude for regulation by the state." *Id.,* at 42.

The *Rice* court chose to interpret the language in *Seagram* just quoted as follows:

> "While the court did make a distinction between the case there under consideration and *Hostetter* on the ground that the latter involved regulation of liquor for use outside the state, whereas the rule considered in *Seagram & Sons* related to liquor to be consumed within the regulating state, the distinction was made for the purpose of determining whether the regulation placed an unconstitutional burden on interstate commerce." *Id.,* at 449.

Seagram did not make this distinction for the purpose *Rice* suggests. The *Seagram* court drew the distinction on the facts for the purpose of identifying *Hostetter* as a "through" case. *Rice's* confusion over the *Seagram* decision is further highlighted by it's discussion of the Sherman Act argument advanced on behalf of the plaintiffs. Nothing could be clearer from *Seagram* than the fact that the Court was discussing the potential application of the Sherman Act to private conduct not mandated, compelled or sanctioned by state law. Its citation to the *Frankfort Distilleries* decision makes that proposition self-evident. Yet, the *Rice* court suggests that the discussion of the potential application of the Sherman Act in *Seagram* illustrates this Court's support for the view that if

> . . . state regulation of liquor to be used within the state is immune from attack because the Twenty-first Amendment affords states plenary powers over liquor con-

> sumed within their borders, free of the restrictions imposed by the Sherman Act, there would have been no necessity for the court (in *Seagram*) to discuss the merits of the antitrust claims. *Id.*, at 450.

Thus, the *Rice* decision attempts to bootstrap from *Seagram's* discussion of the application of the Sherman Act to private conduct, outside the scope of state regulation, to the conclusion that the Sherman Act can be applied so as to conflict with and override a state regulation. Despite the effort in *Rice* to obfuscate the decision in *Seagram,* that decision nevertheless stands as a straightforward application of the "into" method of analysis for determining the primacy of Twenty-first Amendment-based state laws over the commerce clause.

This view of the Amendment, as well as the above-stated construction of *Hostetter,* was strengthened and confirmed by the decision in *Craig* v. *Boren,* 429 U.S. 190 (1976). In *Boren,* the Court invalidated an Oklahoma statute containing an invidious gender-based discrimination as a denial of equal protection of the laws. Nevertheless, in discussing the scope of the Twenty-first Amendment, the Court reiterated its often-voiced view of the relationship between that Amendment and the commerce clause. Justice Brennan, writing for the majority, observed:

> This Court's decisions since [the passage of the Amendment] have confirmed that the Amendment primarily created an exception to the normal operation of the Commerce Clause. See, e.g. *Hostetter* v. *Idlewild Bon Voyage Liquor Corporation,* 377 U.S. 324, 330 (1964); *Carter* v. *Virginia,* 321 U.S. 131, 139-140 (1944) (Frankfurter J., concurring); *Finch & Company* v. *McKittrick,* 305 U.S. 395, 398 (1939). *Id.,* at 206.

The view of *Hostetter* as a decision well within the traditional Twenty-first Amendment standards enunciated by this Court since the adoption of that provision is illustrated in *Heublein, Inc.* v. *South Carolina Tax Commission, supra.* In *Heublein,* the Court considered a commerce clause-based challenge to the operation of a South Carolina liquor statute that operated, in the view of the plaintiff, so as to force it to engage in activities in the state which subjected it to the South Carolina taxing power. This Court upheld the requirement even as an exercise of the state's police power and further observed:

> Nor does this requirement violate the Commerce Clause. The Twenty-first Amendment, § 2, provides that "[t]he transportation or importation into any State. . .for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited. As this court said in *Hostetter* v. *Idlewild Bon Voyage Corp.,* 377 U.S. 324, 330 (1964):
>
> > This court made clear in the early years following the adoption of the Twenty-first Amendment that by virtue of its provisions a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders. *Id.,* at 283.

Likewise, in *State Tax Commission of Mississippi, supra,* the Court cites *Hostetter* as support for the view that the Twenty-first Amendment was intended to free the states of traditional commerce clause limitations and, further,

brackets *Hostetter* with its predecessors in the establishment of the "through-into" dichotomy for Twenty-first Amendment analysis. *Id.*, at 377-378.

Thoughtful lower court decisions reaching the conclusion that the Twenty-first Amendment operates, in cases within its scope, so as to override the commerce clause are *Castlewood International Corporation* v. *Simon,* 596 F.2d 639 (5th Cir., 1979), *Epstein* v. *Lordi,* 261 F.Supp. 921 (D.C.N.J., 1966) and *National Railroad Passenger Corporation* v. *Miller,* 358 F.Supp. 1321 (D.C.Kan., 1973), *affirmed,* 414 U.S. 948 (1973). The *National Railroad* decision is particularly important in light of the decision of this Court to summarily affirm. The *Rice* decision brushed aside *National Railroad* in a footnote (and pointedly ignored this Court's decision to affirm). *Id.*, at 450. Nevertheless, the *National Railroad* decision is important because of the clarity with which it sets forth the Court's view in *Seagram* so as to demolish any notion of a major change in Twenty-first Amendment analysis stemming from *Hostetter. Id.*, at 1327.

The *Epstein* decision is helpful because it succinctly states the view of *Hostetter* which *amicus* has urged upon this Court herein. In *Epstein,* the District Court reviewed the language in *Hostetter* which *Rice* reads as establishing a new constitutional balancing test for Twenty-first Amendment analysis and then observed:

> New Jersey interprets this to mean that the State's power under the Twenty-first Amendment may be somewhat diminished when the interests protected by the Commerce Clause are sufficiently strong. Brief for the Defendant, page 22.

> On the contrary, we read *Hostetter* as requiring a case by case consideration of the national interests protected by the Commerce Clause, not merely to measure the extent of State power under the Twenty-first Amendment, but rather to determine whether the Amendment applies at all to the liquor in question; in a word, whether the liquor enters New Jersey 'for delivery or use therein.' *Id.*, at 933.

Thus viewed, the court in *Epstein* ranked *Hostetter* as belonging to the family of "through" cases rather than signifying the fundamental shift in Twenty-first Amendment analysis which the *Rice* opinion suggests.

III

THIS COURT'S DECISIONS IN CASES INVOLVING FUNDAMENTAL RIGHTS CHALLENGES TO STATE LIQUOR LAWS DO NOT SUPPORT THE RICE BALANCING TEST

Other than *Hostetter* and *Seagram,* the cases principally relied upon by the California Supreme Court in *Rice* in articulating the need to consider the commerce clause and the Twenty-first Amendment in juxtaposition to determine which should prevail are *Wisconsin* v. *Constantineau,* 400 U.S. 433, (1971); *Craig* v. *Boren, supra;* and *California* v. *Larue,* 409 U.S. 109 (1972). None of these cases involve a confrontation between the Twenty-first Amendment and the commerce clause. In every instance, they involve a confrontation between the Twenty-first Amendment and other provisions of the United States Constitution relating to the fundamental rights of individuals.

The relationship between the Twenty-first Amendment and provisions of the United States Constitution other than

the commerce clause is irrelevant to the Twenty-first Amendment issue in the instant case. As one commentator has remarked: "Neither the text nor the history of the Twenty-first Amendment suggests that it qualifies individual rights protected by the Bill of Rights and the Fourteenth Amendment where the sale or use of liquor is concerned." *P. Brest, Processes of Constitutional Decisionmaking, Cases and Materials,* 258 (1975); *Craig* v. *Boren, supra,* at 206.

An example of the *Rice* Court's misinterpretation of the above-cited cases is revealed in its discussion of *Craig* v. *Boren, supra.* At page 451, the *Rice* Court observes:

> The most recent discussion of the Twenty-first Amendment reaffirms that the amendment does not except all state laws involving liquor from every commerce clause enactment. In *Craig* v. *Boren* (1976) 429 U.S. 190, 97 S. Ct. 451, 50 L. Ed.2d 397, an Oklahoma statute specifying different drinking ages for men and women was declared unconstitutional under the equal protection clause.

Thus, the *Rice* decision cites *Craig* v. *Boren* for the proposition that state liquor laws may be subordinate to the commerce clause and yet immediately recognizes *Craig* v. *Boren* as an equal protection case. This inconsistency is not explained.

Likewise, the *Rice* Court felt that *California* v. *Larue, supra,* "did not, however, cast doubt on the need to accommodate and balance." *Id.* at 451. And yet, *California* v. *Larue* involved the relationship between the Twenty-first Amendment and the First Amendment. The case did not deal with the commerce clause and *Rice's* reliance upon it in support of its balancing test is misplaced. The fact that

the Court has been called upon to weigh the competing constitutional interests in the cases discussed herein lends no support for the *Rice* view that commerce clause interests should similarly be weighed against the Twenty-first Amendment since the Amendment was intended to take precedence over that provision in cases falling within its scope.

CONCLUSION

The decision of the Court below should be reversed for the reasons stated herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, W. Curtis Sewell, attorney for the Virginia Beer Wholesalers Association, and a member of the Bar of the Supreme Court of the United States, hereby certify that three (3) copies of this Brief of *Amicus Curiae* in Support of the petitioner, California Retail Liquor Dealers Association, together with three (3) copies of the Motion for Leave to File a Brief *Amicus Curiae,* have been served upon each of counsel of record for the parties herein, pursuant to Supreme Court Rule 33(1)(3b) by depositing same in the U.S. Post

Office with air mail postage prepaid, this 15th day of November, 1979, as follows:

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